BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DANNY VINCENT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,034,948
WESTAR ENERGY, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the December 17, 2007, preliminary hearing Order entered by Administrative Law Judge Thomas Klein.

ISSUES

Claimant alleges he injured his right shoulder on May 9, 2005, when he rolled his company truck when driving home. In the December 17, 2007, Order, Judge Klein awarded claimant both medical benefits and, if taken off work, temporary total disability benefits. The Judge reasoned:

> Claimant was acting as an agent for the Respondent. Part of the Claimant's duties as an agent was to keep a company truck. Claimant had an accident in the company vehicle when returning home. The Claimant has suffered a compensable injury.[1]

Respondent contends Judge Klein erred. Respondent argues claimant's accident "did not arise out of and in the course of his employment and that he did not suffer any accidental injury while employed by and working for Westar Energy, Inc."[2] In short, respondent argues claimant's accident is not compensable under the Workers Compensation Act as claimant was not on duty when the accident occurred. Accordingly, respondent requests the Board to deny claimant's request for benefits.

Conversely, claimant contends the December 17, 2007, Order should be affirmed. Claimant argues at the time of his accident he was working for respondent as an agent

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[1] ALJ Order (Dec. 17, 2007).

[2] Respondent's Brief at 2 (filed Feb. 14, 2008).

rather than as a lineman, which placed him on-call 24 hours a day with a company truck. Claimant argues his accident is compensable under the Act as it occurred while he was driving home shortly after checking on a report of some street lights being out. In addition, claimant argues the accident should be found compensable as it was necessary for claimant to travel to perform his job and, therefore, it falls under one of the exceptions of the "going and coming" rule. Claimant's arguments are summarized, as follows:

> There is more than sufficient evidence to support the Court's finding that Claimant was acting as an agent and was on-duty at the time of his injury and therefore the injury is compensable. If however, the Board does not find that Claimant was not *[sic]* on duty at the time of the accident, Claimant would argue that the injury is compensable under an exception to the "coming and going" rule.
>
> The "coming and going" rule states that if an employee is coming to work or going home from work, and the employee suffers an injury, as a general rule, the injury is not compensable under workers' compensation. However, exceptions have been carved out of this rule; one exception includes when it is necessary for an employee to travel for their employer (citation omitted) and another exception is when the employee performs work out of their vehicle (citation omitted). Both of these exceptions apply to the case at hand. The Claimant was driving a truck provided by Respondent, [it is] necessary for Claimant to travel for Respondent to do his job duties as an agent and when called to a job site, Claimant must work out of his vehicle to perform his job duties.[3]

Respondent's application for review was not filed within 10 days of the issuance of the December 17, 2007, Order. Respondent's counsel, however, asserts neither he nor claimant's counsel received a copy of the Order until late January 2008. Claimant has not challenged that statement. Moreover, there is no reason to question the validity of the statements made by respondent's attorney, who is considered to be an officer of the court. Accordingly, the timeliness of respondent's application for review is not an issue. But if it were an issue, the undersigned would find the application was timely.[4]

Based upon the above, the Board has jurisdiction over this appeal. Moreover, the only issue before the Board on this appeal is whether claimant's May 9, 2005, accident arose out of and in the course of his employment with respondent.

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[3] Claimant's Brief at 3, 4 (filed Feb. 27, 2008).

[4] See *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999) and *Johnson v. Brooks Plumbing*, 281 Kan. 1212, 135 P.3d 1203 (2006).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date, the undersigned finds and concludes the December 17, 2007, Order should be affirmed.

On the morning of May 9, 2005, respondent promoted claimant from being a lineman to being an agent. Agents are on-call 24 hours a day and are provided company trucks to allow them to travel straight from their homes to wherever they are sent to repair respondent's power lines and equipment. Agents are generally paid from the time they get in their trucks at home until they return home.[5]

On May 9, 2005, at approximately 10:30 p.m. claimant rolled his company truck onto its side as he was heading home. Claimant testified the accident occurred when he overcorrected his steering after moving to the ditch to avoid a car. Claimant described the accident, as follows:

> Went, turned up Peter Pan Road and there was a car coming, had his bright lights on and when I glanced over and got off the road, got in the ditch and tried to over correct and rolled the truck.[6]

Shortly before the accident, claimant had picked up his truck at the service center from the mechanics who were checking the boom. Claimant chose a route home that would permit him to check some lights that had been reported out.

Claimant did not initially believe he was injured very badly and, therefore, he did not seek medical treatment the night of the accident. The next morning, however, claimant was experiencing significant pain and stiffness and he sought treatment at a local hospital emergency room.

Claimant initially reported he had fallen at home. Before leaving the hospital, however, claimant admitted he had not fallen at home and acknowledged his symptoms were related to the truck accident the night before. Claimant explained this discrepancy by testifying he was reluctant to report his accident as being work-related as it would ruin the safety record at work.

Claimant's concerns about spoiling the safety record were legitimate. Claimant's testimony that some of his co-workers became angry was substantiated by the testimony of his former supervisor, Scott Grant. According to Mr. Grant, his division had a 4,000-day

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[5] P.H. Trans. at 17.

[6] *Id.* at 18.

accident-free record that entitled the employees to various rewards. And when Mr. Grant told the other employees about the streak ending, he experienced problems with his crew.[7]

As a result of his injuries, claimant underwent surgery in which plates were inserted to stabilize his fractured right clavicle. Claimant now requests surgery to remove that hardware as the plate has fractured and at least one screw is loose.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] "Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case."[9]

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

There is no question that claimant was returning home at the time of his accident after picking up his truck from respondent's service center. Likewise, there is no question claimant was on-call 24 hours a day and required to take his truck home, which benefitted respondent as it allowed claimant to immediately respond when called. The undersigned finds that claimant's accident arose out of and in the course of his employment with respondent. In short, claimant was required to travel to various locations to perform his job. Accordingly, the undersigned finds claimant's work began when he got in his truck to respond to a service call and it did not end until he arrived home. In addition, the

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[7] *Id.* at 47, 48.

[8] K.S.A. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

[10] *Id.* at 278.

undersigned finds claimant is obligated to drive his truck home at the end of the workday or a service call, which makes such travel an incident of his employment.

Moreover, the travel required by claimant's job at all hours of the day and night and in all types of weather exposed him to greater travel risk than experienced by the general public. In that vein claimant's accident is compensable under the doctrine of increased risk as set forth by the Kansas Supreme Court and Kansas Court of Appeals in *Hensley*[11] and *Orr*.[12]

Respondent argues that during its investigation of the accident claimant stated he was not on duty at the time of the accident and, therefore, he should be denied workers compensation benefits. The undersigned disagrees. Claimant's belief is not relevant as it does not change the fact that claimant's travel was an incident of his employment.

Finally, the undersigned finds claimant's testimony is credible. Accordingly, the undersigned finds that claimant was reluctant to report his injuries as work-related as he wanted to preserve respondent's safety record. The undersigned finds claimant injured his right shoulder clavicle in the May 9, 2005, truck accident and, therefore, his present need for medical treatment to remove the broken plate and loose screws is related to that accident. Claimant's injury did not occur at home.

In summary, the undersigned affirms the findings and conclusions of Judge Klein. Accordingly, the December 17, 2007, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned affirms the December 17, 2007, Order entered by Judge Klein.

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[11] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

[12] *Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 627 P.2d 1193, *aff'd* 230 Kan. 271, 634 P.2d 1067 (1981).

[13] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of March, 2008.

KENTON D. WIRTH
BOARD MEMBER

c: Angela D. Trimble, Attorney for Claimant
Gary E. Laughlin, Attorney for Respondent
Thomas Klein, Administrative Law Judge